

Service Date: August 17, 1987

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
OF Kenyon Noble Lumber Company,)	
Inc., d/b/a Kenyon Noble Ready)	DOCKET NO. T-9027
Mix for a Class B Certificate of)	
Public Convenience and Necessity.)	ORDER NO. 5789a

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FINAL ORDER

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Pursuant to 2-4-621, MCA, a proposed order authorizing a denial of the authority requested was issued in this matter on July 1, 1987. No exceptions, briefs or requests for oral argument have been received. Therefore, the Commission adopts the proposed order as its final order in this matter.

APPEARANCES

FOR THE APPLICANT:

Peter M. Kirwan, Attorney at Law, Kirwan and Barrett, P.O. Box 1348, Bozeman, Montana 59711-1348

FOR THE PROTESTANTS:

John R. Davidson, Attorney at Law, Davidson & Poppler, Room

810, First Bank Building, Billings, Montana 59101, appearing on behalf of Getter Trucking, Inc.

Charles Murray, Attorney at Law, 2812 First Avenue North, Billings, Montana 59101, appearing on behalf of W.R. Drinkwalter and Leta F. Drinkwalter, d/b/a W.R. Drinkwalter & Sons Trucking, and Bob Boyd Trucking, Inc.

David L. Jackson, Attorney at Law, Jackson, Murdo, Grant and Larsen, P.C., 203 North Ewing, Helena, Montana 59601, appearing on behalf of Hi-Ball Trucking, Inc., Dick Irvin, Inc., and the Waggoners Trucking

John P. Atkins, Attorney at Law, Bryan and Atkins, P.O. Box 1371, Bozeman, Montana 59715, appearing on behalf of Jack Trent, d/b/a Jack's Welding and Machine

FOR THE COMMISSION:

Robin A. McHugh, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620-2601

BEFORE:

TOM MONAHAN, Commissioner & Hearing Examiner
JOHN B. DRISCOLL, Commissioner

BACKGROUND

On November 25, 1986, the Commission received an application from Kenyon Noble Lumber Company, Inc. (Applicant or Kenyon Noble), for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of construction equipment and any other type of equipment needing separate over-road transport, including but not limited to contractors' equipment, dozers, scrapers, loaders, and backhoes, between all points and places in the following counties: Gallatin, Madison, Beaverhead,

Silver Bow, Deer Lodge, Jefferson, Powell, Lewis and Clark, Broadwater, Park, Sweet Grass, Wheatland, Judith Basin, Fergus, Golden Valley, Stillwater, Carbon, Musselshell and Yellowstone.

The Commission received written protests to the application from Getter Trucking, Inc., Bob Boyd Trucking, Inc., Hi-Ball Trucking, Inc. and Jack Trent. Late intervention was granted to Willard R. and Leta F. Drinkwalter. Dick Irvin, Inc., and The Waggoners Trucking did not submit written protests nor seek late intervention, but both were represented at the hearing by counsel.

Following issuance of proper notice a hearing was held on February 11, 1987, in the Conference Room of the Commission Offices, 2701 Prospect Avenue, Helena, Montana. At the conclusion of the hearing the parties agreed to order a transcript and established a briefing schedule to begin following receipt of the transcript. On February 24, 1987, the Commission received a Notice of Withdrawal of Application. Several Protestants filed objections to the Notice of Withdrawal. On March 19, 1987, at a regularly scheduled work session, the Commission voted to not allow a withdrawal of the application. Parties wishing to submit briefs were given until April 17, 1987; reply briefs were due on May 1, 1987.

SUMMARY OF TESTIMONY

Testimony of Applicant:

Mr. William Ogle, 1010 Bear Canyon Road, Bozeman, Montana, appeared and testified in support of the application. Mr. Ogle is a 50 percent stockholder in Kenyon Noble Lumber Company, Inc. and the manager of the Kenyon Noble Ready Mix Division. Mr. Ogle gave a general description of the Kenyon Noble Lumber Company and explained why the company submitted an application to the Commission for operating authority.

Kenyon Noble is a well established business in the Bozeman area. It consists of a hardware store, a construction materials supply business, and a ready mix plant. In addition, Kenyon Noble operates three portable batch plants that are moved to various locations in southwest Montana. Kenyon Noble uses its own equipment and hires its own drivers to meet its transportation needs. Mr. Ogle explained that in recent years Kenyon Noble has also used its transportation equipment to haul for others. The company concluded that if it were to continue to haul for others it needed authority from this Commission. Mr. Ogle stated that Kenyon Noble made several hauls for others before the Company realized that Commission authority was needed for such transport. He also admitted that Kenyon Noble made at least one haul for hire after becoming aware that such hauls are illegal absent the proper authority. Mr. Ogle indicated that he was aware that Getter

Trucking and Jack Trent are available to transport the kind of equipment that Kenyon Noble proposes to transport in its application.

Testimony of Shipper Witnesses:

Mr. Bryon Rydland, 8450 South 19th, Bozeman, Montana, appeared and testified in support of the application. Mr. Rydland is an excavator and owns several large pieces of equipment. He stated that he often has a need to move his equipment on very short notice. He indicated that Kenyon Noble could meet his needs and that he was not aware of another carrier in the Bozeman area who could do so.

On cross-examination Mr. Rydland admitted that he had never inquired whether Getter Trucking could meet his needs. He further admitted that he had never sought transportation service from a carrier other than Kenyon Noble. He stated however that he would use other carriers if they could meet his needs.

Mr. Ken Draheim, 3024 Westridge Drive, Bozeman, Montana, appeared and testified in support of the application. Mr. Draheim is a forester for Yellowstone Basin Properties. Yellowstone Basin develops recreational 20 acre tracts. It owns road building equipment but no hauling equipment. Mr. Draheim indicated that Yellowstone Basin has used Kenyon Noble and Bob Boyd Trucking to move equipment. He said that he used Kenyon Noble on one occasion

because Bob Boyd was busy and a company out of Billings was too expensive. He said that he sees a need in the Bozeman area for the kind of service proposed by Kenyon Noble. Mr. Draheim said that he called Getter Trucking on one occasion and could not get service.

He agreed that Getter has the necessary equipment and said he would have no objection to using Getter. Mr. Draheim also indicated that he would have no objection to using Hi-Ball, Dick Irvin, Jack Trent, or the Waggoners if they could provide the service at a reasonable price.

Mr. Garth Sime, 485 Zachariah Lane, Bozeman, Montana, appeared and testified on behalf of the Applicant. Mr. Sime owns heavy equipment for excavation, light roadwork, and site development. He stated that he often needs a lowboy to move his equipment and there are occasions when none are available. He professed a need for an additional lowboy in the Bozeman area. Mr. Sime said that he is familiar with Getter Trucking, The Waggoners, and Hi-Ball. He was not familiar with Bob Boyd or Dick Irvin. He indicated that he would use any carrier who could provide adequate service at a reasonable price. He also indicated that he has used Jack Trent and Kenyon Noble to transport his equipment.

Testimony of Protestants:

Mr. James Clark, 5517 Walter Hagen Driver, Billings,

Montana, appeared and testified on behalf of Protestant Getter Trucking. Mr. Clark is a vice president of Getter. He described Getter's operation and authority and said that Getter has the equipment to provide the service proposed in the present application. He also said that Getter has suffered a decline in revenue and could use additional business. He maintained that Getter had never refused a requested shipment from Bozeman and that Bozeman shippers had never requested that Getter station equipment in Bozeman.

Mr. Willard R. Drinkwalter, d/b/a W.R. Drinkwalter & Sons Trucking, 2546 Highway 87, Billings, Montana, appeared and testified in opposition to the application. Mr. Drinkwalter indicated that some of his equipment is idle and it would be available to meet any need expressed in support of the present application. He said he should have an opportunity to meet the need before additional authority is granted.

Mr. Robert Boyd, 9th Street Island, Livingston, Montana, appeared and testified in opposition to the application. Mr. Boyd is president of Bob Boyd Trucking, Inc. Mr. Boyd indicated that he does not presently own a lowboy but could buy one or lease one if necessary. He maintained that existing carriers are available to meet any need expressed in support of this application. He said that his company has not had the opportunity to meet the need and he stated that a grant of authority would have an adverse impact on

his business.

Mr. Charles Trent, 416 First Avenue West, Three Forks, Montana, appeared and testified in opposition to the application.

Mr. Trent owns Jack's Welding & Machine and has authority to haul heavy equipment. He said that he has idle equipment and could meet the needs expressed by the witnesses in support of the present application.

Mr. Clinton Worman, 614 Hidden Valley Road, Bozeman, Montana and Mr. Virgin Ward, Belgrade, Montana, appeared and testified that they have a need for heavy equipment carriers. They both said that they have not had a problem receiving service from existing carriers.

DISCUSSION, ANALYSIS AND FINDINGS

In considering applications for operating authority, the Commission is governed by the provisions of 69-12-323, MCA.

Paragraph (2)(a) of that section provides as follows:

(2)(a) If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or

other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

Applying this language to the facts presented by any application for additional transportation authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the applicant has demonstrated that there is a public need for the proposed service. If the applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the

applicant fit to provide the proposed service.

The traditional analysis described above has perhaps been stated most concisely in the case of Pan American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

The first question to be addressed, therefore, is whether the Applicant has demonstrated a public need for the proposed service. Three shipper witnesses appeared to support the application. All three either own, or work for a company that owns various pieces of heavy equipment. All three testified to a need for additional heavy equipment carriers. Each indicated that on occasion equipment needs to be moved and it is difficult to locate a carrier.

Public need is a difficult concept to define precisely; it is also difficult to determine when it has been conclusively demonstrated. It is always possible for an applicant to present shipper witnesses who have complaints about existing service. The Commission's determination of public need, however, must take into account more than specific complaints and preferences; the

Commission must determine whether the expressions of need are isolated grievances which can be expected in response to any service, or whether the expressions of need reflect a breakdown in the transportation system which can be alleviated by the entry of another carrier in furtherance of the public interest. The Commission finds that public need has been demonstrated. The record indicates that there are persons with a need, sometimes an urgent need, to move heavy equipment, and that those persons have not always obtained service. Absent considerations to be discussed, the Commission would be justified in concluding that an additional carrier is necessary to meet the declared need.

Demonstration of need is, however, only one element to consider when deciding whether to grant additional authority. Another element, and equally important, is whether existing carriers can and will meet the need. In this case it is abundantly clear that there are existing carriers who can and will meet the expressed need if given an opportunity. No shipper witness made the thorough inquiries into the availability of existing carriers that would justify the conclusion that an additional carrier is needed. Mr. Rydland said he had never sought transportation from a carrier other than Kenyon Noble. Mr. Draheim indicated that he has used Kenyon Noble, Bob Boyd Trucking, and on one occasion could not get service from Getter Trucking, but he admitted that he had never sought service from Hi-Ball, Dick Irvin, Jack Trent, or the

Waggoners. Mr. Sime stated that he had only sought service from Kenyon Noble and Jack Trent.

It is axiomatic that shipper preference does not provide a basis for a grant of additional authority. Existing carriers, who are willing and able to meet an expressed need, must be given an opportunity to do so. In this case the record indicates that there are existing carriers, including several with equipment stationed in the Bozeman area, who are available to meet the expressed need but have not been given the chance. Furthermore, there is testimony on the record from shippers who expressed satisfaction with service from existing carriers. There is no evidence on the record indicating that existing carriers either cannot provide the service proposed, have refused to provide the service, or that the service they provide is inadequate. In light of this the Commission cannot grant additional authority.

Because the Applicant has failed to satisfy the second part of the analysis described in paragraph 16, it is not necessary to discuss the remaining elements contained therein. The Commission wishes to point out, however, that even if all other elements are satisfied, an applicant must be found fit or the application will be denied. One of the factors considered when determining fitness is whether an applicant has engaged in illegal transportation. In this case the record is clear that Kenyon Noble made illegal hauls, including at least one occasion when the

illegality was known to Kenyon Noble. The Commission does not reach a conclusion on the question of whether this illegality would be reason for denial if all other elements of public convenience and necessity had been met. The Commission does, however, take an exceedingly grim view of illegal transportation, especially when that transportation is done in bad faith. Persons who are interested, or who might be interested, in applying for transportation authority should be on notice that this Commission is not averse to denying authority to those who flaunt the transportation laws of the State of Montana. Further, it should be known that the Commission takes the gravest view of the seriousness of the oath administered to witnesses testifying before it and demands absolute fidelity to that oath. Deliberate misstatements, misleading statements, or the deliberate withholding of facts in sworn testimony before the Commission can be referred to state district court for action.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. Applicant has demonstrated a public demand or need for the proposed service.

4. Applicant has not demonstrated that existing carriers cannot meet that demand or need.

5. Following hearing on the application and based upon the evidence in the record, the Commission concludes that public convenience and necessity do not require the granting of the application herein.

ORDER

NOW THEREFORE IT IS ORDERED that the Application in Docket No. T-9027 be denied.

IT IS FURTHER ORDERED that all motions made and not ruled on are hereby denied.

IT IS FURTHER ORDERED that the Applicant must, within thirty (30) days of the mailing of the notice of the rights herein granted comply with all rules and regulations of the Montana Public Service

Commission.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.